



Signed and Filed: August 18, 2009

A handwritten signature in dark ink, appearing to read "T. E. Carlson", is written over a horizontal line.

THOMAS E. CARLSON
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re)	Case No. 08-30575 TEC
)	
ALLIANCE FINANCIAL)	Chapter 7
CAPITAL, INC.,)	
)	
)	
Debtor.)	

**MEMORANDUM RE TRUSTEE'S MOTION FOR ORDER AUTHORIZING SURCHARGE OF
CASH COLLATERAL TO PAY ADMINISTRATIVE EXPENSES**

On June 29, 2009, the court held a hearing in the above-captioned case on trustee's Motion for Order Authorizing Surcharge of Cash Collateral to Pay Administrative Expenses. Katherine D. Ray appeared for the chapter 7 trustee, E. Lynn Schoenmann. Chris D. Kuhner appeared for Jacqueline Jackson, the Jacqueline Jackson Trust, the Robert S. Jackson Trust, and Jacqueline and David Fenton (the Jackson-Fenton Parties).

For the following reasons, the trustee's motion for surcharge is granted in the sum of \$12,385.50.

FACTS

The Jackson-Fenton parties hold a judgment lien in the sum of \$289,970, recorded against Debtor on October 30, 2007. Debtor filed the above-captioned bankruptcy case on April 4, 2008. As of

1 that date, the Jackson-Fenton parties had not recovered any amount
2 of their judgment. The bankruptcy case was converted to chapter 7
3 on April 22, 2008. On April 30, 2008, the chapter 7 trustee was
4 appointed.

5 On June 27, 2008, trustee filed a motion to abandon non-cash
6 assets of the estate. The motion recited that trustee holds cash
7 in the sum of \$249,456 (the Cash).

8 Trustee contends that her professionals spent 35.10 hours
9 collecting the Cash,¹ for which they incurred fees totaling
10 \$13,468.50.² \$1,855 of this amount relates to the termination of a
11 factoring agreement with Security Protection Services and obtaining
12 a replacement factor, which yielded \$16,536 for the estate. Other
13 services in this category include investigating the status of
14 Debtor's receivables, installment payments owing to Debtor, and
15 bankruptcy claims filed by Debtor in other cases.

16 In addition to services related to recovering the Cash
17 (Category C), trustee's professionals rendered services in the
18 following categories: (1) Category A: identification and
19 preservation of estate assets, \$16,430; (2) Category B:
20 identification of and responding to competing liens, adverse
21 claims, and interests, \$6,872.50; and (3) Category D: disposition
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25 ¹ This figure is taken from Category C (Services Rendered to
26 Marshall and Liquidate Estate Assets) in the Supplement to
Trustee's Motion for Surcharge, filed on June 5, 2009.

27 ² An order was signed on February 24, 2009 approving the first
28 and final fee application of trustee's counsel, and awarding fees
in the sum of \$67,408.50. An order was signed on March 11, 2009
approving the fee application of trustee's accountant, and awarding
fees in the sum of \$7,631.50.

1 of assets, \$14,541.³ Trustee seeks to surcharge the Jackson-Fenton
2 parties with all of these fees, plus the trustee's statutory fee of
3 \$9,223.⁴

4 Trustee argues that the Jackson-Fenton parties benefitted from
5 her services and those of her professionals, because the Jackson-
6 Fenton parties received all of the Cash collected by trustee,
7 except funds that were not property of the estate (\$31,827), funds
8 paid to Burke Environmental LLC with the consent of the Jackson-
9 Fenton parties (\$22,808), and a \$75,000 surcharge reserve.⁵ Trustee
10 argues that, absent her services and those of her professionals,
11 the trustee could not have collected the cash ultimately
12 distributed to the Jackson-Fenton parties. Trustee contends that,
13 had she not done so, the Jackson-Fenton parties would have had to
14 determine the extent and identity of all parties believed to hold
15 liens, claims or interests in Debtor's assets. Regarding the funds
16 paid to Burke Environmental LLC, trustee argues that these were
17 overpayments by account debtors to which the Jackson-Fenton parties
18 had no right, but from which, thanks to the efforts of trustee, the
19 Jackson-Fenton parties received \$4,000.

22 ³ This category only includes counsel's efforts to obtain
23 secured creditor consent to use cash collateral to pay the
24 trustee's administrative expenses, and trustee's motion to
25 distribute assets to secured creditors and to abandon non-cash
26 assets to Debtor.

27 ⁴ This is the statutory maximum based upon the \$119,457
28 disbursed by trustee to the Jackson-Fenton parties.

29 ⁵ The parties stipulated to set aside \$75,000 of the Jackson-
30 Fenton parties' collateral, in the event the court surcharged such
31 collateral with all the allowed fees of trustee's counsel and
32 accountant. The parties did not stipulate to the amount of the
33 surcharge.

1 **GOVERNING LAW**

2 Pursuant to 11 U.S.C. § 506(c), administrative expenses may be
3 reimbursed out of a secured party's collateral upon a showing that
4 the expenses incurred were reasonable, necessary, and provided a
5 benefit to the secured creditor, or that the secured creditor
6 caused or consented to the expense. In re Compton Impressions
7 Ltd., 217 F.3d 1256, 1262 (9th Cir. 2000); In re Cascade Hydraulics
8 & Utility Svc., Inc., 815 F.2d 546, 548 (9th Cir. 1987). The party
9 seeking the surcharge has the burden of showing a "concrete" and
10 "quantifiable" benefit. In re Debbie Reynolds Hotel & Casino,
11 Inc., 255 F.3d 1061, 1068 (9th Cir. 2001).

12 The necessity and reasonableness of trustee's expenses are
13 measured against the benefits obtained for the secured creditor
14 "and the amount that the secured creditor would have necessarily
15 incurred through foreclosure and disposal of the property."
16 Compton, 217 F.3d at 1260. To establish benefit, movant must
17 establish in quantifiable terms that it expended funds "directly to
18 protect and preserve the collateral." Compton, 217 F.3d at 1261.

19 **DISCUSSION**

20 (1) The Jackson-Fenton parties received a quantifiable benefit
21 only regarding the Cash collected by trustee. Trustee moved to
22 abandon all other assets shortly after she was appointed.

23 (2) If the Jackson-Fenton parties had enforced their lien
24 against the Cash themselves, they would have had to: (a) examine
25 Debtor's books and records to identify bank deposits and
26 collectible accounts receivable; (b) examine public records for
27 liens; (c) file papers with the levying officer and give notice to
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1 third parties with an interest in the Cash; and (d) respond to
2 competing claims of third parties.

3 (3) Trustee's professionals collected the Cash and examined
4 competing claims against the Cash.

5 (4) The Jackson-Fenton parties did not consent to a section
6 506(c) surcharge of the Cash. Trustee does not contend that the
7 stipulation to reserve \$75,000 for the section 506(c) surcharge
8 resolved the amount of the surcharge to be allowed. Trustee has
9 filed no other evidence of consent to the amount of the surcharge
10 sought by trustee and her professionals. The Jackson-Fenton
11 parties' failure to object to the services provided by trustee and
12 her professionals, and notice of non-opposition to conversion of
13 the case to chapter 7, do not imply consent. See Cascade
14 Hydraulics, 815 F.2d at 548 ("Mere cooperation with the debtor does
15 not make the secured creditor liable for all administrative
16 expenses.")

17 (5) The statutory commission sought by trustee is not properly
18 charged to the Jackson-Fenton parties, because trustee has not
19 submitted time records showing that she performed any of the acts
20 necessary for collecting and preserving the Cash or, to the extent
21 she did perform such acts, the value of the services performed.
22 The section 326 commission, calculated from funds distributed to
23 creditors, is the compensation due from the estate for all the
24 services performed by a trustee, and does not establish the benefit
25 provided to secured creditors for purposes of section 506(c).

26 (6) The Cash should be surcharged in the amount of \$5,299.50
27 for accountants' fees and expenses. All of the work performed by
28 the accountants, other than services related to case

1 administration, related to recovering the Cash. The accountants'
2 request for surcharge voluntarily reduced the amount sought by
3 \$2,430.87 to exclude services related to case administration.⁶

4 (7) The Cash should be surcharged in the amount of \$7,086 for
5 the following services performed by trustee's counsel. Trustee's
6 counsel liquidated Debtor's factoring agreement with Security
7 Protection Services, obtained funds from Debtor's bank accounts and
8 lockbox, secured Debtor's premises, reviewed Debtor's books and
9 records, obtained a portion of Burke Environmental LLC's cash
10 collateral and distributed such funds to the Jackson-Fenton
11 parties, and reviewed competing liens and interests.

12 (8) The Cash should not be surcharged the amounts sought by
13 trustee's counsel for the services described below, because those
14 services did not provide a quantifiable benefit to the Jackson-
15 Fenton parties.

16 (a) *The surcharge motion and counsel's efforts to obtain*
17 *the Jackson-Fenton parties' stipulation to surcharge.*

18 These services provided no benefit to the Jackson-Fenton
19 parties, and would have been unnecessary outside of
20 bankruptcy.

21 (b) *Services regarding estate's non-cash assets.* These
22 services did not benefit the Jackson-Fenton parties,
23 because those assets yielded no monetary recovery for the
24 Jackson-Fenton parties. Debbie Reynolds, 255 F.3d at

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27 ⁶ The original fee application filed by trustee's accountants,
28 and approved by this court on March 11, 2009, sought \$7,660.37 in
fees and expenses. Trustee's accountants consented to a reduction
in this sum in the Supplement to Trustee's Motion for Surcharge,
filed on June 5, 2009.

1068; In re Baum's Bologna, Inc., 50 B.R. 689, 691 (E.D. Pa. 1985).

(c) *Conferences with third party lawyers; drafting internal memoranda; motions to abandon assets and for turnover; services re scooters and houseboat; review of Debtor's schedules; Blue-Sky research.* Counsel has failed to show that this work was part of the identification and recovery of the Cash, or the notification of parties holding competing liens and interests against the Cash.

****END OF MEMORANDUM****

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